165-253

Supreme Court of the United States

OCTOBER TERM, 1904.

Term No., 642.—Case No. 18,275.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

THE STATE OF INDIANA, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Stephen O. Fromme,
Attorney for Plaintiff in Error.

Willard Brown,
Charles W. Weiss,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

I, William A. Ketcham, the Attorney-General for the State of Indiana, do hereby certify that the matters and facts set forth in the above and foregoing petition are true.

WILLIAM A. KETCHAM.

STATE OF INDIANA, } SCT:
MARION COUNTY, }

Americus C. Daily, being first duly sworn on his oath, states that he is the Auditor of State of the State of Indiana, and, as such, charged with the duties appertaining to said office; that he is familiar with the facts set forth in the above and foregoing petition, and that the same are true in substance and in fact as therein averred and set forth, and further affiant saith not.

AMERICUS C. DAILY.

Subscribed and sworn to before me, the undersigned, a Notary Public within and for said county and State, this 19th day of November, 1896. Witness my hand and Notarial Seal.

{ SEAL. }

HATTIE MOORE,
Notary Public.

The plaintiff in error in the above entitled cause of *The Western Union Telegraph Company* v. *The State of Indiana*, defendant in error, hereby accepts service of notice of the above and foregoing motion to advance said cause and set it for argument following the other causes set on the first Monday in December.

SAMUEL O. PICKENS,
Attorney for Plaintiff in Error.

November 19, 1896.

165-255

Supreme Court of the United States.

OCTOBER TERM, 1896.

Term No., 649.—Case No. 16428.

THE WESTERN UNION TELEGRAPH COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

SAMUEL O. PICKENS,
Attorney for Plaintiff in Error.

WILLARD BROWN,
CHARLES W. WELLS,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

Term No., 649.—Case No. 16428.

THE WESTERN UNION TELEGRAPH COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was brought by the State of Indiana against the Western Union Telegraph Company in the circuit court of Marion county, Indiana, to recover the taxes due from the telegraph company for the years 1893 and 1894, together with delinquent penalties thereon, under the act of the General Assembly of the State of Indiana approved March 6, 1893. The State recovered judgment for the sum of $76,023.65, the amount of the taxes and penalties thereon for the years named (Record, pp. 69 and 82). From this judgment the telegraph company appealed to the supreme court of the State, where the judgment was affirmed, in an opinion by that court set out in

the Record, pages 86 to 92 (44 N. E. R., 793). The case is brought to this Court by a writ of error (Record, p. 95). In 1891 the General Assembly of the State of Indiana enacted a statute governing the assessment and collection of taxes upon all properties within the jurisdiction of the State. Section 152 of that statute provides that any person or taxpayer may pay the full amount of the taxes charged against him on or before the third Monday in April, or may, at his option, pay the first installment on or before such third Monday and the remaining installment on or before the first Monday of November following, provided that in all cases where the first installment shall not be paid on or before the third Monday in April the whole amount unpaid shall become due and be returned delinquent and collected as provided by law, and there shall be a penalty added of 10 per cent. upon the amount of any installment not paid when due which the persons or property assessed shall pay, together with the cost of collection, and, if such taxes remain delinquent at the succeeding first Monday in November, there shall be a penalty of 6 per centum added to all such taxes that became delinquent at the preceding April and November settlements, and a penalty of 10 per centum only shall be added to the current delinquency on the first Monday in November.

The act of March 6, 1893, is a statute providing for the taxation of telegraph, telephone, palace car, sleeping car, drawing-room car, dining car, express and fast freight joint stock associations, companies, copartnerships, and corporations transacting business in the State, and is intended, as specifically stated in the act, to take the place of sections 68, 69, 70, and 71 of the statute of 1891.

Section 11 of the act of 1893 is as follows:

"In case any such association, copartnership or corporation as named in this supplemental and amendatory act shall fail or refuse to pay any taxes assessed against it in any county or township in the State, in addition to other remedies

provided by law for the collection of taxes, an action may be prosecuted in the name of the State of Indiana by the prosecuting attorneys of the different judicial circuits of the State, on the relation of the auditors of the different counties of this State, and the judgment in said action shall include a penalty of fifty per cent. of the amount of taxes so assessed and unpaid, together with reasonable attorney's fees for the prosecution of such action, which action may be prosecuted in any county into, through, over or across which the line or route of any such association, copartnership, company or corporation shall extend, or in any county where such association, company, copartnership or corporation shall have an office or agent for the transaction of business. In case such association, company, copartnership or corporation shall have refused to pay the whole of the taxes assessed against the same by said State board of tax commissioners, or in case such association, company, copartnership or corporation shall have refused to pay the taxes or any portion thereof assessed to it in any particular county or counties, township or townships, such action may include the whole or any portion of the taxes so unpaid in any county or counties, township or townships, but the attorney general may, at his option, unite in one action the entire amount of the tax due, or may bring separate actions in each separate county or township, or join counties and townships, as he may prefer. All collection of taxes for or on account of any particular county, made in any such suit or suits, shall be by said auditor of State accounted for as a credit to the respective counties for or on account of which such collections were made by said auditor of State, at the next ensuing settlement with such county, but the penalty so collected shall be credited to the general fund of the State; and upon such settlement being made, the treasurers of the several counties shall, at their next settlements, enter credits upon the proper duplicates in their offices, and at the next settlement with such county report the amount so received by him in his settlement with the State, and proper entries shall be made with reference thereto: *Provided, however*, That in any such action the amount of the assessment fixed by said State board of tax commissioners and apportioned to such county, or apportioned by the county auditor to any particular township, shall not be controverted."

In December, 1893, the Western Union Telegraph Company brought a suit in equity in the circuit court of Marion county, Indiana, against Thomas Taggart, as auditor of said county, and others, to enjoin the defendants as county auditors and county treasurers from entering upon the tax duplicate and collecting from the telegraph company the taxes claimed to be due from the company for the year 1893 upon the assessments of the company's property as made by the State board of tax commissioners under the said act of 1893, on the ground that the said act was void because in conflict with the Constitution of the United States and the constitution of the State of Indiana. That cause was finally decided in this court on the 18th day of May, 1896 (W. U. T. Co. *vs.* Taggart, 163 U. S., 1). Pending that suit, on the 7th day of May, 1894, this action was brought by the attorney general to recover the taxes for 1893.

In August, 1894, plaintiff in error filed a bill in the circuit court of the United States for the district of Indiana against the auditor of state of the State of Indiana to enjoin him from certifying to the auditors of the various counties the assessment of its property made by the State board of tax commissioners for the year 1894, on the ground of the unconstitutionality of the statute. A demurrer was sustained to the bill and the bill dismissed for want of equity. From this decree of the circuit court an appeal was prayed and granted to this court, and the case was filed and docketed February 17, 1896, as No. 448 of October term, 1896. The injunction which was granted pending the case in the circuit court was continued pending the appeal. The decision in the Taggart case having disposed of all the questions involved in the case against the auditor of State, the appeal was dismissed on the 7th of December, 1896. In the Taggart case the circuit court of Marion county granted an order enjoining the defendants in that suit from collecting the taxes

in controversy pending the appeal to the supreme court of the State, and the supreme court of the State granted an order enjoining the collection pending the writ of error in the Supreme Court of the United States. On the 11th of June, 1895, the State filed a supplemental complaint in the case now in hand for recovery of the taxes due from plaintiff in error for the year 1894.

The plaintiff in error demurred to the supplemental complaint, which was overruled, and the ruling excepted to (Record, pp. 53, 54). Plaintiff in error filed answers to both the original and supplemental complaints, averring substantially the same facts as to the unconstitutionality of the act of 1893 as were alleged in the bill of complaint in the Taggart case, changed so as to constitute an answer, and alleging the granting and the existence of the injunction orders in the Taggart case and the case against the auditor of State above referred to. The answer to the original complaint is in the Record, at pages 6 to 25, and the answer to the supplemental complaint at pages 54 to 58. Demurrers were sustained to these answers and exceptions reserved to the rulings. (Record, pp. 44 and 69.)

Before the bringing of this action, the telegraph company had tendered to the various tax-collectors in the counties in which its property was assessed for taxation sums in discharge of its taxes for the years 1893 and 1894 based upon the valuation of its property for the year 1892, which tenders were accepted on account of the company's taxes in some of the counties.

After the demurrers to the answers were sustained, plaintiff in error refusing to plead further, the cause came on for hearing for assessment of damages only. The case was submitted on agreed statements of fact (Record, pp. 78 to 82). The finding and judgment were for the State for $109,585.35. To the finding and judgment plaintiff in error excepted. (Record, p. 70.)

Plaintiff in error duly filed its motion for a new trial, which was overruled and the ruling excepted to (Record pp. 71–73). Among the grounds assigned for a new trial are that the finding and judgment are not sustained by the evidence; that the finding and judgment are contrary to law; that there is error in the assessment of the amount of recovery, in this, that the assessment of the amount of the recovery is too large. These are statutory grounds for a new trial under the Indiana code. Either of them present the question of the validity of the penalties in controversy in this cause.

Upon the overruling of the motion for a new trial plaintiff in error filed its motion in four paragraphs to modify the judgment. (Record, pp. 73–75.)

The first paragraph was to reduce the amount of the finding and judgment to $44,933.61 and proper penalties, if any penalties should be finally adjudged due. This paragraph was based upon an error in the amount of taxes supposed to be due from plaintiff in error at the time the judgment was rendered; which error was discovered by the parties upon recomputing the taxes.

The second paragraph of the motion was to modify the judgment by fixing the amount at $44,933.61, being the taxes found due upon the recomputation without any penalties, on the grounds, 1st, that it appeared from the record and admitted facts that the defendant had been diligently prosecuting suits in courts of competent jurisdiction for the purpose of determining the question of the constitutionality of the law under which the taxes were assessed, and that ever since the taxes became due and payable injunctions from such courts had been in force which prevented the collection of such taxes; 2d, that the penalty of 50 per cent. mentioned in said act of 1893 is uncollectible, for the reason that the said statute, if otherwise valid, whether it makes such penalty a substitute for all other penalties or is in addition thereto or a penalty upon other

penalties as well as upon the principal amounts, is, in so far as it purports to fix such penalty, unconstitutional and void, all other tax-payers of the State of Indiana except those mentioned in said act being subject to a penalty in case of non-payment of taxes at the time fixed by statute of only 10 and 16 per cent., according to the character of the delinquency, in that it violates article 1, sections 1 and 12; article 10, section 1, and article 4, section 22, of the constitution of Indiana, and article 14, section 1, of the Constitution of the United States; 3d, that the act of 1893 does not provide for the addition of any penalty whatever in any suit brought by the attorney general.

The third paragraph of the motion was to modify the finding and judgment, in case the court should find any penalties due whatsoever, by striking out all sums included in the finding and judgment as penalties beyond a sum equal to 16 per cent. of the amount of the balance of the taxes found to be due for the year 1893 and beyond a sum equal to 10 per cent. of the amount of the balance of taxes found to be due for the year 1894, because the 50 per cent. penalty is unconstitutional and void.

The fourth paragraph of the motion was to modify the judgment by striking out all sums included for penalties except for the 50 per cent. penalty, leaving that the sole and only penalty and in lieu of all other penalties.

The court sustained the motion to modify as to the first paragraph and overruled it as to all the others; to which ruling plaintiff in error excepted. (Record, p. 76.)

Judgment was thereupon entered for $76,023.65, which was made up as follows: $20,925.21, balance of taxes due for the year 1893; $3,348.02, the 16 per cent. penalty under the provision of section 152 of the statute of 1891; $12,136.61, the 50 per cent. penalty provided for by section 11 of the act of 1893; $24,008.40, balance of the taxes due for the year 1894; $2,400.84, the 10 per cent. penalty thereon, and $13,204.62, the 50 per cent. penalty. The 10

and 16 per cent. penalties aggregate $5,748.86, the 50 per cent. $25,341.23, and the total penalties $31,090.09.

Errors were assigned in the supreme court of the State that the original complaint did not state facts sufficient to constitute a cause of action; that the supplemental complaint did not state a cause of action (under the Indiana code sufficiency of a complaint may be first tested on such an assignment of error); that the court erred in overruling the demurrer to the supplemental complaint; that the court erred in sustaining the demurrers to the answers to the original and supplemental complaints; that the court erred in overruling the motion for a new trial, and that the court erred in overruling the second, third, and fourth paragraphs of the motion to modify the judgment. (Record, pp. 85, 86.)

The plaintiff in error contended in the supreme court of the State that the 50 per cent. penalty clause of the act of 1893 was invalid in that it was in conflict with section 1 of the fourteenth amendment of the Constitution of the United States, because it denies to the associations, copartnerships, and corporations named in the act the equal protection of the laws, and deprives such associations, copartnerships, and corporations of their property without due process of law. The supreme court of the State decided against this contention and upheld the statute and sustained the 50 per cent. penalty included in the judgment.

The questions as to whether the 50 per cent. penalty clause of the act of 1893 contravenes the Constitution of the United States, and as to the validity of the 50 per cent. penalty included in the judgment rendered against plaintiff in error, are involved in this writ of error.

ASSIGNMENT OF ERRORS.

Plaintiff in error assigns for error—

1st. That the supreme court of the State in its opinion and judgment rendered in this cause erred in holding and

adjudging that the act of March 6, 1893, relating to and providing for the assessment and valuation by the State board of tax commissioners of the property of the Western Union Telegraph Company other than that designated by said act as "subject to local taxation within the State," and relating to and providing for the collection of taxes and penalties thereon of the Western Union Telegraph Company and its property, does not deny to the said Western Union Telegraph Company the equal protection of the laws required by section 1 of the fourteenth amendment to the Constitution of the United States touching the assessment and valuation of its said property lawfully subject to taxation in Indiana.

2d. That the supreme court of Indiana in its opinion and judgment rendered in this cause erred in holding and adjudging that the sections and provisions of said act of 1893 relating to and providing for the taxation of telegraph companies and relating to and providing for the assessment and valuation for taxation by the State board of tax commissioners of the property of the Western Union Telegraph Company other than that designated by said act as "subject to local taxation within the State," and relating to and providing for the collection of the taxes and penalties thereon of the Western Union Telegraph Company and its property, provided for and secured for the said Western Union Telegraph Company the due process of law required by section 1 of the fourteenth amendment of the Constitution of the United States touching the assessment and valuation of its said property lawfully subject to taxation in Indiana.

3d. That the supreme court of Indiana in its opinion and judgment rendered in this cause erred in holding and adjudging that the sections and provisions of said act of 1893 relating to and providing for the taxation of telegraph

companies, and relating to and providing for the assessment and valuation for taxation by the State board of tax commissioners of the property of the Western Union Telegraph Company other than that designated by said act as "subject to local taxation within the State," and relating to and providing for the collection of the taxes and penalties thereon of the Western Union Telegraph Company and its property, do not violate article 1, section 8, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States by requiring the assessment and valuation for taxation by the State board of tax commissioners of the instrumentalities of interstate and international commerce owned and used by said company and the income and earnings of said company from interstate and international commerce under the guise of assessing a part of the property of said company lawfully subject to taxation within the State of Indiana.

ARGUMENT.

1. The provision of section 11 of the act of 1893, providing for the collection of a penalty of 50 per cent. of the delinquent taxes of the companies, copartnerships, and corporations and their properties named in the act, in addition to the ordinary penalties imposed upon all other tax-payers and their properties for the same delinquency, arbitrarily discriminates against said companies, copartnerships, and corporations and their property as compared with all other tax-payers and property in the State, in that thereby the said companies, copartnerships, and corporations are necessarily subject to unequal, ununiform, and greater exactions for the support of the government than are all other tax-payers, and therefore denies to the said companies, copartnerships, and corporations and to plaintiff in error the equal protection of the laws, in contravention of the fourteenth amendment of the Constitution of the United States.

The statute of 1891, which relates to the assessment and collection of taxes against the property of all other persons and corporations except those enumerated in the act of 1893, provides, in case of delinquency by any tax-payer, for the collection of uniform penalties of 10 and 16 per cent. depending upon the character of the delinquency. For similar delinquencies on the part of the associations, copartnerships, or corporations named in the act of 1893 the legislature has sought by the provisions of that act to impose a penalty of 50 per cent. By these statutes the legislature has declared that all property-owners and their property except telegraph companies, telephone companies, express companies, and palace and sleeping car companies shall be protected against any and all penalties for non-payment of taxes except the penalties of 10 and 16 per cent., and that as to the said excepted tax-payers they shall be subject to the payment of an additional penalty of 50 per cent. The fixing of the 10 and 16 per cent. penalty for the delinquency of all other tax-payers is a declaration that they shall not be subjected to any other penalty.

We maintain that the State cannot impose an ununiform and unequal penalty for the same delinquency any more than it can fix an unequal and ununiform rate of assessment, and that any statute of the State providing for such ununiform and unequal penalties would be in conflict with the provision of the Federal Constitution under consideration. Uniformity in the rate is fundamental in all laws for ad valorem property taxation.

"In the second place, it is of the very essence of taxation that it be levied with equality and uniformity, and to this end that there should be some system of apportionment. Where the burden is common, there should be common contribution to discharge it. Taxation is the equivalent for the protection which the Government affords to the persons and property of its citizens, and as all are alike protected, so all alike should bear the burden in proportion to the interests secured. * * * And when taxes are levied upon

property there must be an apportionment with reference to a uniform standard, or they degenerate into mere arbitrary exactions." (Cooley's Constitutional Limitations, 6th edition, 607.)

"As to all taxation apportioned upon property, there must be taxing districts, and within these districts the rule of absolute uniformity must be applicable" (*ib.*, 610). "But, whatever may be the basis of taxation, the requirement that it shall be uniform is universal." (*Ib.*, 615.)

Doubtless it will be urged that these fundamental rules as to uniformity and equality, laid down by the distinguished author on constitutional law, have reference to the assessment and rate of taxation. Certainly they do. But they are no less applicable to penalties and all other exactions from the citizen for the support of the Government. It was said by Mr. Justice Field, in County of San Mateo *vs.* Southern Pacific Railroad Co., 13 Fed. Rep., 722, in discussing the question of "the equal protection of the laws," as applied to the taxation of railroad companies, that—

"The 'equal protection of the laws' to any one implies not only that he has a right to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also that he is exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. This equal protection forbids unequal exactions of any kind, and among them that of unequal taxation."

It cannot be denied that a tax law fixing one *rate* of taxation for one class of tax-payers, or for one class of property, and another and different rate for all other tax-payers or all other property, would be repugnant to the provision of the Federal Constitution forbidding any State to "deny to any person within its jurisdiction the equal protection of the laws." Are the laws of a State fixing one penalty for delinquency for one class of tax-payers and another and different penalty for a like delinquency on the part of all

other tax-payers any less under the condemnation of the Constitution?

The universal requirement of uniformity and equality in all just and valid systems of taxation is based upon the natural and inalienable right of every citizen that he shall not be required to contribute more than his *proportion* for the support of government, which is supposed to give its protection to all citizens alike. The 10 per cent. penalty, the 16 per cent. penalty, and the 50 per cent. penalty all go into the treasury for the support of the government the same as the *taxes* levied and collected. When the penalties are collected they become part of the taxes, and are so treated by the State. The section of the act under consideration expressly provides that the 50 per cent., when collected, shall go into the general fund of the State.

The act of March 18, 1875, of the State of Pennsylvania, after providing that taxes assessed and levied upon real estate shall be a lien on such real estate from the time of said levy, and shall have priority to any mortgage thereon, provides that if such taxes remain unpaid after the first day of September in any year an additional sum of 5 per cent. shall be added thereto, and if said taxes remain unpaid after the first day of October in any year an additional sum of 5 per cent. shall be added thereto.

In the appeal of The City of Titusville, 108 Pa. St., 600, it was held that such additional sums added for delay in payment *become part of the taxes.*

The penalties provided by the tax laws of Indiana, therefore, are burdens or exactions laid upon the citizen for the support of the government, and must be governed by the rule of equality and uniformity.

Judge Cooley says:

"*Every burden* which the State imposes upon its citizens with a view to revenue, either for itself or for any of the municipal governments or for the support of the governmental machinery in any of the political divisions, is *levied*

under the power of taxation, whether imposed under the name of tax or under some other designation."

Constitutional Limitations, 6th ed., 611.

Need this question be argued further? If this is not denial of the equal protection of the laws, then we cannot conceive of a State legislative enactment imposing burdens or exactions for support of government which would conflict with the Federal inhibition.

In concluding what we have had to say upon this question, we beg to submit an illustration which will plainly show how unequal the burdens of government must rest upon property-owners in this State, if this provision of the act in question is upheld. The property ("railroad track" and "rolling stock") of the Cincinnati, Fort Wayne and Louisville Railroad Company was assessed for taxation, for the year 1893, at $2,083,405, say, in round numbers, $2,000,000, and the lines of appellant were assessed at $2,297,652, say, in round numbers, $2,000,000. The State tax levy for that year was 32 cents on the one hundred dollars, which would make the taxes to be paid by each of these companies, for the support of the State government, $6,400.

Now suppose the taxes of each of these companies on this assessment became delinquent; under the tax laws of the State the railroad company would be compelled to pay for the support of the State government the $6,400 plus 10 per cent. thereon, or $7,040, while the telegraph company would be compelled to pay the $6,400 plus 50 per cent., or $9,600; and if the attorney general's contention, as evidenced by the judgment in this case, is sound, the telegraph company would have to pay the $6,400 plus 10 per cent. plus 50 per cent. upon the $6,400 *and* upon the 10 per cent. thereof, making a total of $10,560.

We do not deny the power of the legislature to classify property for the purposes of taxation, but such classifica-

tion must be reasonable, not arbitrary. A classification which necessarily subjects the members of the class to additional and much greater contributions for the support of the government than all other persons are subject to in the same district would be illegal.

"Given a tax and a district, the sum demanded of any one person or laid upon any one parcel of property must have fixed relation to the whole tax, as well as that demanded of every other person or laid upon every other piece of property."

Cooley on Taxation, 180.

The rate of assessment must be equal and uniform throughout the district for which the tax is levied, to the end that the burden may be as nearly equal as practicable. (Adamson *vs.* Auditor, 9 Ind., 174; Conwell *vs.* O'Brien, 11 Ind., 419; Covington Drawbridge Co. *vs.* Auditor, 14 *id.*, 331; Bright *vs.* McCollough, 27 *id.*, 223.)

We deny the power of the State to impose upon the members of a certain class of tax-payers (or, rather, upon certain members of a class, for other owners of unit properties, such as railroad companies and bridge companies, are exempt from the 50 per cent. penalty) burdens for delinquencies in the payment of taxes greatly more onerous than are imposed upon all other tax-payers of the State for exactly similar delinquencies.

Under the scheme of taxation provided for by the tax laws of the State of Indiana, all property is required to be assessed for taxation at its true cash value.

The constitution of the State provides that there shall be a uniform and equal rate of assessment and taxation. It cannot be doubted that if the statute of 1891 had required that the property of all tax-payers of the State, except telegraph companies, telephone companies, express companies, and palace car companies, should be assessed at 50 per cent. of its true cash value, and the act of 1893 had

required that the property of all telegraph companies, telephone companies, express companies, and palace car companies should be assessed at 75 per cent. of its true cash value, that there would have been a denial of the equal protection of the laws; yet the imposition of unequal burdens would have been no clearer in that case than in the case under consideration. The difference is not in substance or effect, but in form only.

Judge Sharswood, in Grim *vs.* School District, 57 Penn. St., 433, truly says: "Perfectly equal taxation will remain an unattainable good as long as laws and government and man are imperfect." Judge Cooley says: "But are there not cases which on their face are manifestly so unequal and unjust as to furnish conclusive evidence that equality has not been sought for, but avoided; that oppression, not justice, was desired, and confiscation, not taxation, intended?"

Cooley on Taxation, 128.

This appears to be one of the sort of cases the learned author had in mind.

It will be observed, on an examination of the act of March 6, 1893, that it is supplemental and amendatory of the act regulating taxation, approved March 6, 1891. The act of March 6, 1893, in terms applies to telegraph, telephone, palace car, sleeping car, drawing-room car, express and fast freight, joint stock association companies, copartnerships, and corporations transacting business in the State of Indiana, and to none other, while the act of March 6, 1891, covers all other corporations, copartnerships, and individuals and regulates the taxation of the same. By reference to section 11 of the amendatory act it will be found that there is imposed arbitrarily upon the class of corporations named in the supplemental act, in case of failure to pay the taxes on the day named in the original act, not only the same penalty which corporations, under the orig-

inal act, are required to pay, to wit, 10 or 16 per cent., depending upon the character of the delinquency, but there is also imposed, in addition to these penalties, a penalty of 50 per cent. upon the tax, plus the 10 or 16 per cent. Such is the construction of this statute by the supreme court of Indiana, and such have been the penalties imposed upon this plaintiff in error, of which it complains in this proceeding. The result is that while in this case there is a total liability against the plaintiff in error of about $76,000, taxes and penalties, the penalties alone amount to $31,090.09 of this sum, as stated *ante;* and of this sum of $31,090.09 only $5,748.86 would have been imposed upon a corporation or individual, under the law of 1891, guilty of precisely the same delinquencies of which the plaintiff in error in this case has been guilty. While it is undoubtedly competent for the State authorities to provide legitimate penalties to secure the prompt payment of revenues due the State, yet we insist it is not permissible for them to make arbitrary classifications and under such arbitrary classifications adopt rules which practically confiscate the property of one particular class of corporations which may fail to pay taxes on a particular day and leave other classes of corporations under the same general description and designation free from such penalties. It will be observed that railway companies, bridge companies, street railway companies, ferry companies, and all other corporations of like character sustaining similar relations to the public with those designated in the act of 1893 are wholly relieved from any obligation to pay such enormous penalties in case of delinquency or failure to pay their taxes on a specified day.

It may be urged, as it has been heretofore, that there is a particular reason why the class of corporations enumerated in the act of 1893 should be thus put under heavy bonds to pay promptly the amounts due the State, in that the ordinary methods of collection are not available to the officers

of the State. But surely this argument has no force when we consider that railway companies, ferry companies, street railway companies, and bridge companies have no greater claims to exemption from sequestration, execution, etc., than the corporations named in the amendatory act, and that the same methods would be necessary in their case as in the case of the corporations named in the act of 1893. In the case of The Western Union Telegraph Company against The Attorney General (125 U. S., 530) this Court very clearly indicated that, although an injunction against the operation of the telegraph lines would not be authorized in case of non-payment of taxes, yet there remain to the State all the ordinary ways of enforcing a judgment for taxes, to wit, execution, sequestration, and any other appropriate remedy in chancery. Certainly the same method which would enable the State to enforce payment of taxes from a railroad company or from a bridge company would be available to its officers as against a telegraph or telephone company. It is therefore a purely arbitrary classification which is adopted by this act, and one designed, in view of the litigation which has taken place, to punish any person who dared to question the right of the State in the courts to tax as provided in the act of 1893.

Again, the provision of the act of 1893, now under consideration, denies to the associations, copartnerships, and corporations named the equal protection of the laws, in that it authorizes, "in addition to other remedies provided by law for the collection of taxes," actions to be prosecuted by the attorney general of the State and judgments to be rendered against the person of the tax-payer belonging to the class named in the act for failure or refusal to pay any taxes assessed against it, while all other tax-payers are, by the laws of the State, protected against any such additional remedy. Certain members of a particular class of tax-payers (quasi-public corporations) are singled out from all others of that class, as well as from all other tax-payers,

and an "additional remedy" provided against them when they fail or refuse to pay any tax assessed against them.

2. "Due Process of Law." "The Law of the Land."—In view of what we have said and the authorities we have cited in discussing the question of "the equal protection of the laws" it would seem unnecessary for us to discuss this point at any considerable length. The guaranty of "due process of law" is found in the constitution of every State in the Union. The terms are not always the same, but the meaning is the same in every case. In some the words are "due process (or course) of law," in others "the law of the land," and again in others both forms of words are used. The provision of the fourteenth amendment to the Constitution of the United States is as follows: * * * "nor shall any State deprive any person of life, liberty, or property without due process of law."

The guaranty applies to legislative enactments as well as to judicial proceedings. (Cooley on Constitutional Limitations, 6th ed., 431.)

There are many definitions in the books of the meaning of the words "due process of law" and "the law of the land." A few will suffice here. Mr. Webster's definition, in the argument of the *Dartmouth College case*, has been quoted with approval probably oftener than any other. It is as follows:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

One of the most accurate definitions is that of Mr. Justice Johnson in *Bank of Columbia vs. Okely*, 4 Wheat., 235–244:

"After volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled

down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of Government unrestrained by the established principles of private rights and distributive justice."

Chief Justice Hemphill, of Texas, in *Janes vs. Reynolds*, 2 Tex., 250, defined the terms thus:

"The terms 'law of the land' * * * are now, in their most usual acceptation, regarded as general public laws, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals."

In discussing the question as to what is "due process of law," Judge Cooley says (Constitutional Limitations, 6th edition, 434):

"The principles, then, upon which the process is based are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen. When the Government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated by the Government to public uses, or the legislature interferes to give direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of

law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

When section 11 of the act of 1893 is tested " by these principles of civil liberty and constitutional protection which have become established in our system of laws," it is plain that it cannot stand. These principles protect the citizen in the enjoyment of his person and property against special, partial, and class legislation. They protect him against *unequal* burdens and exactions of government. By these principles he is entitled to the enjoyment of the protection and blessings of government alike with all other citizens of the State, upon payment of his *proportion* of the burdens and exactions necessary to the maintenance of that government

We respectfully submit that the judgment of the supreme court of the State of Indiana should be reversed and the cause remanded with directions to grant plaintiff in error a new trial or sustain its motion to modify the judgment of the Marion circuit court by reducing it to the amount of the taxes and the 16 and 10 per cent. penalties thereon.

SAMUEL O. PICKENS,
Attorney for Plaintiff in Error.

WILLARD BROWN,
CHARLES W. WELLS,
Of Counsel.

DECEMBER 11, 1896.

165-252

165-255

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

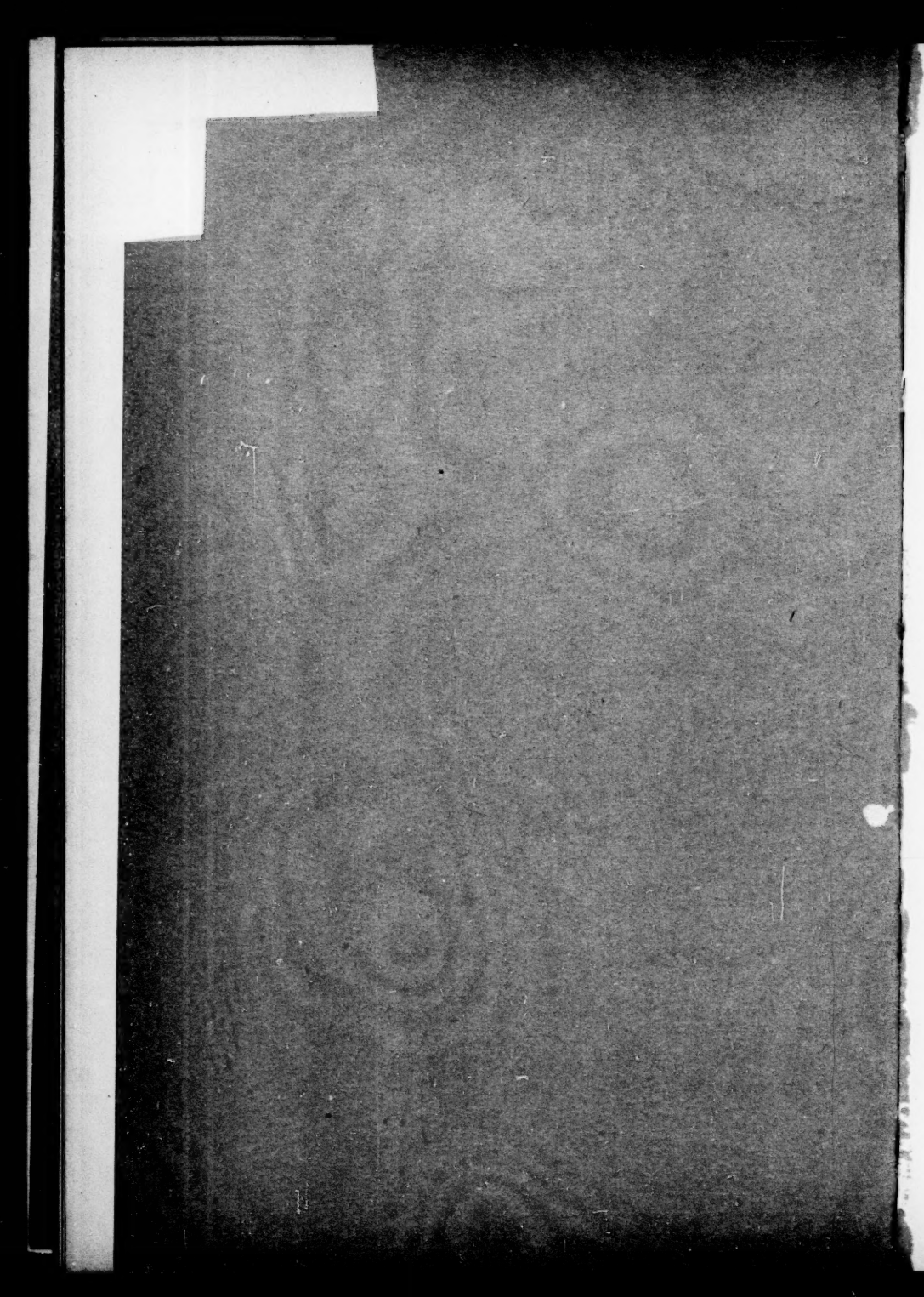
THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,
vs.
THE STATE OF INDIANA,
Defendant in Error.

Case No.
Term No. 649.

ERROR TO THE SUPREME COURT OF INDIANA.

Brief for Defendant in Error.

WM. B. BURFORD, PRINTER, INDIANAPOLIS.



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STATEMENT OF THE CASE.

This is another branch of the controversy between the Western Union Telegraph Company and the State of Indiana over the telegraph tax law of 1893 and the various cases and steps that have been taken with reference to that law in the Courts are as follows:

1. In September, 1893, the plaintiff in error brought suit against the auditors and treasurers of the various counties in the State of Indiana, through or into which its lines extended, to enjoin the collection of the taxes assessed for the year 1893 on the ground that the act of 1893 was unconstitutional. This case was decided in favor of the validity of the law in the Marion Circuit Court, from which an appeal was taken to the Supreme Court of Indiana, where the judgment was affirmed as reported in 141 Ind. p. 281. A writ of error was granted from this court to the Supreme Court of Indiana to review that decision, and the judgment in that case was affirmed in the opinion reported in 163 U. S. 1.

2. At the conclusion of the session of the State Board of Tax Commissioners for the year 1894, a bill in equity was filed in the Circuit Court of the United States for the District of Indiana against John O. Henderson, as Auditor of the State of Indiana, to enjoin him from certifying to the auditors of the various counties the assessment made by the State Board of Tax Commissioners. Subsequently the term of office of Henderson having expired, and he having been succeeded as Auditor of State by Americus C. Daily, said Daily was substituted as defendant in that case and the cause continued as to him.

A demurrer to the bill was sustained and on an opinion reported in 68 Federal Reporter, at p. 588, wherein it was held that the act of 1893 was constitutional, the bill was dismissed for want

of equity. From this decree dismissing the bill an appeal was prayed and granted to the Supreme Court of the United States, where the case was docketed, being case No. 448 of this term of this court. This case was set down for argument, with other similar cases, following the cases set for the 7th of December. At the present writing we have been advised by counsel for the appellant in that case that they would not argue the case, but would dismiss the appeal, and we presume that has been done, but are not further informed on the subject.

3. Following the failure by the Western Union Telegraph Company, on the third Monday in April, 1894, to pay the taxes assessed for the year 1893, the taxes being permitted to go delinquent, the State of Indiana, the defendant in error here, on the 7th of May, 1894, filed its complaint in the Marion Circuit Court, under the provisions of Section 11 of the act of 1893, to recover the taxes for 1893, with the delinquencies and penalties chargeable under the statutes of the State of Indiana, including, among others, the penalty of 50 per centum, to be collected in the event of a suit by the prosecuting attorney of any county, or by the attorney-general of the state in the event of a suit to collect the taxes for several counties, and it is the action that was had in that case that is complained of here. We will go further into the details of that matter presently.

4. The taxes assessed for the year 1895 remaining unpaid and delinquent after the third

Monday in April, 1896, the State of Indiana brought another suit to collect these taxes. The answer in that case was filed several days after the decision by this Court in *Western Union Telegraph Company* v. *Taggart et al.*, 163 U. S. 1, in which the validity of the law was upheld. The plaintiff in error, however, still contending, notwithstanding that decision, that the act was unconstitutional, the cause was put at issue and judgment was rendered against it for the taxes of 1895, on the 2d day of July, 1896, from which an appeal was prayed to the Supreme Court, where the judgment of the Court below was affirmed on the 2d of December, 1896, by an opinion not yet reported in the Northeastern. As yet no writ of error has been applied for in that case, the statute of the State allowing sixty days for the filing of a petition for a rehearing. As soon, however, as that time has elapsed or the petition for a rehearing that may be filed has been disposed of, we presume that in accordance with its settled practice the Western Union will be again knocking at the door of this Court for a writ of error to review that judgment. It seems difficult to convince this plaintiff in error that with respect to it and its property the State of Indiana has any rights whatever except the right to appear and plead at the bar of this Court.

Returning to the particular proceedings had in this case now pending, we are not able at this writing to refer specifically to page and line of the

record, inasmuch as the plaintiff in error, for reasons that were undoubtedly satisfactory to it and its learned counsel, saw fit not to have the record printed, and we are, therefore, under the necessity of making references to the record and the assignments of error, seeking to present questions here, in a general way, without reference specifically to page and line of the transcript.

As I have said *supra*, on the 7th of May, 1894, the original complaint in this case was filed. No demurrer was interposed to the sufficiency of this complaint, but on the 12th of January, 1895, an answer was filed in one paragraph. That answer is quite elaborate and lengthy, covering probably thirty or forty printed pages independent of its exhibits, the exhibits including, among other things, a transcript of the old law for the assessment of telegraph companies and a copy of the entire law of March 6th, 1893, together with various returns and statements made by the plaintiff in error. The answer itself is nothing but a copy of the complaint that was filed in the first named case to enjoin the County auditors and treasurers with a change in the exordium and peroration so as to make it fill the office that it was designed to fill, viz.: answer in lieu of the complaint as originally drawn. Nothing further was done in this case until the 9th of May, 1895, when a demurrer was filed to this answer challenging its sufficiency. On the 14th of May, 1895, the Supreme Court of the State decided the Taggart case as reported in 141 Ind. *supra*, and on the 11th of June, 1895, the

Circuit Court sustained the demurrer to the answer, and at the same time, the time for the payment of the taxes for the year 1894 without penalty having expired, and the taxes having become delinquent, leave was granted, under the practice that obtains in Indiana, to file a supplemental complaint, and a supplemental complaint was thereupon filed asking judgment for the delinquent taxes for the year 1894. To this supplemental complaint on the 15th of June, 1895, a demurrer was filed and overruled on the 22d of June. On the 27th of June an answer was filed to the supplemental complaint which is an anomaly in pleading. It will be remembered that a demurrer had been sustained to the answer to the original complaint so that, as there was but one paragraph of answer, the original complaint stood unanswered, the demurrer taking that answer out of the case except for the purpose of appeal based upon the alleged error in sustaining the demurrer to it. Nevertheless, the answer to the supplemental complaint, treating the original answer as though it were in full force, is based upon that answer, the language being "adopts and makes a part hereof all the allegations of the answer to the complaint herein not specially relating to the assessment and collection of taxes for the year 1893, except as herein differently alleged."

As a rule, in all the relations of life, unless it be in pleading, where the foundation is withdrawn and no substitute provided in its stead, the superstructure must fall. We submit that the rule of

pleading is not different from the general rule that obtains, and there being no basis for the answer to the supplemental complaint, because of the fact that there was no answer pending to the original complaint, there was no error in sustaining the demurrer to it. That was the view taken of the pleading by the Supreme Court of the State, and upon the authority of that case and the reasoning in connection with it, we submit that the position is impregnable.

To this answer a demurrer was interposed and on the 3d of September, 1895, this demurrer was sustained; and on the 9th of September, there being no pleading on file contesting or in any manner controverting the averments of the complaint and of the supplemental complaint, the matters therein alleged were submitted to the Court for the assessment of damages, and there being no plea or proof of payment, judgment was rendered for $109,585.35. A motion for a new trial was filed and on the 2d of November, 1895, was overruled, and a motion was made to modify, in the respect named, the judgment as to the amount of the recovery, and it being conceded upon the showing then made to the Attorney-General of Indiana that there had been payments made sufficient to reduce the amount of the recovery, the judgment was reduced to $76,023.65 and the motion to modify in the other particular was overruled.

Meanwhile this Court, on the 18th day of May, 1896, had affirmed the Taggart case and had thus

upheld the validity of the act of 1893 in question by the opinion in 163 U. S. 1, and on the 2d of October, 1896, the Supreme Court of Indiana by an opinion reported in 44 N. E. 793, affirmed the judgment of the Marion Circuit Court, and it is this action that is complained of in this case, and to review it that the writ of error is sued out.

The assignment of error here seeks to present,

1. The unconstitutionality generally of the act of March 6, 1893.

2. That the Supreme Court of the State erred in holding that the act of March 6, 1893, provided and secured to the plaintiff in error "due process of law."

3 That the Court erred in holding that the act of March 6, 1893, does not "deny to the plaintiff in error the equal protection of the laws."

4. That the Court erred in holding that the act of March 6, 1893, did not violate the provisions of the Constitution prohibiting the imposition of a burden upon interstate commerce.

We submit that, by the very full and careful decision in the Taggart case, all the questions sought to be raised by these assignments of error, have been fully and completely disposed of, except provision of the act authorizing, in a suit by the attorney-general to collect the taxes, the judgment to include a penalty of fifty per centum, and it is thus claimed by the assignments of error that the plaintiff in error was denied the equal protection of the laws; and that we submit and insist is the sole question presented by this record.

It was maintained below, and may perhaps be insisted here, that because of the injunction that had been granted in the Taggart case, restraining the county officials from proceeding by distraint and sale, to collect the taxes, the State was in substance and in effect prohibited and enjoined from prosecuting this action as to the original complaint, and that, because of the temporary injunction granted by the United States Circuit Court pending the litigation in that Court, the State was in substance and in effect enjoined from prosecuting this action as to the supplemental complaint. As to these contentions, we submit

1. That they do not present a federal question.
2. That, even if they do, the contention is not well founded.

The question as to what remedies, if any, are afforded or provided by a state statute, and whether they are, in substance, identical with other provisions or in addition to other provisions of the statutes of the state, is a question of construction, and upon the construction of a state statute the decision by the highest court of the state is binding upon other courts.

Chicago, Milwaukee & St. Paul R'y Co. v. *Minnesota*, 134 U. S. 418.

Whether such a construction is violative of any provision of the United States Constitution is a federal question, but what the statute requires is purely a question of the construction of a state law, and upon that question the decision of the

highest court of the state on writ of error to the Supreme Court of the United States is conclusive.

The suit in this case was by the state. If, in either the action in the Circuit Court of Marion County or the action in the Circuit Courts of the United States, the suits to restrain in the one case the county officers and in the other the Auditor of State from proceeding as they were forbidden to proceed in these actions, could be construed as actions against the State directly forbidding it to apply to the courts to enforce rights that it might see fit to apply to the courts for the enforcement of, then, in each and both of the cases, as to so much of the relief as it is claimed enjoins and forbids the State from proceeding, the actions and each of them would be *coram non judice*, for there is no provision in any statute or the Constitution in the State of Indiana conferring upon any state court jurisdiction to enjoin or restrain the state from proceeding in an action in the court to ask for relief, and the eleventh amendment to the United States Constitution specifically and in terms denies to the Circuit Courts such jurisdiction.

In re Ayers, 123 U. S. 443, where the action was not even in form against the State, but against the officer of the State as such, in discharge of the duty imposed upon him by statute. In other cases not necessary to consider in this connection, this Court has held that it would enjoin the particular officer of a State from the performance of particular duties imposed upon him by a statute which is held to

be unconstitutional; but we know of no adjudged case in which it has been held by this Court or by any court that the Circuit Court of the United States has jurisdiction in a suit by a citizen of another state to enjoin the State itself from the commission of any act, and, in the opinion of Judge Baker in the Daily case *supra*, it is carefully pointed out that he maintains jurisdiction because it is not a suit against the State. If, therefore, either of these actions had been against the State as such to enjoin it from enforcing the collection of these taxes by proceedings had in the courts, it goes without further argument that either court must have declined to entertain jurisdiction of the action, and it is a novel and extraordinary proposition that courts should, by construction, hold that something had been done by indirection which the Court unquestionably had no jurisdiction to accomplish directly.

Upon this subject we do not think it is necessary to add anything further to what has been said by the Supreme Court of Indiana upon this contention: if, indeed, this contention shall appear upon the argument of this case, as to which we are not advised by anything either in the record or out of it. There is, therefore, but the one remaining question, which we insist is the only question presented by this record, viz.: Is the provision contained in Section 11 of the act of March 6, 1893, authorizing, in a suit by the Attorney-General for the collection of taxes assessed against telegraph, telephone, express and sleeping-car companies,

the judgment to include an additional penalty of fifty per centum violative of that provision of the first section of the Fourteenth Amendment to the Constitution of the United States, which provides "nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

It is not denied that the plaintiff in error was a person within the jurisdiction of the State of Indiana, and, therefore, that it comes within the language "any person within its jurisdiction." We insist that the provision in question does not deny to it the equal protection of the laws. No system of taxation, could, by possibility, deny to states the right of classification for purposes of taxation. There could be no complete, perfect or even tolerable system of taxation that did not authorize classification.

> *Home Ins. Co.* v. *New York*, 134 U. S. 606.
> *R. R. Co.* v. *Gibbes*, 142 U. S. 386.
> *Indiana Ry. Tax Cases*, 154 U. S. 421, 438–39.
> *Commonwealth* v. *Delaware Division Canal Co.*, 123 Pa. St. 594.

Undoubtedly the system of classification must not be an arbitrary one. In the state of Indiana properties are variously classified and different methods of assessment are provided in the act of 1891, to which this particular act is amendatory and supplementary.

1 Persons generally.
2. Associations for banking purposes not incorporated.
(Sec. 59; R. S. 1894, § 8469.)

3. The capital stock in banks incorporated, whether under the laws of the state or of the United States.

(Secs. 60 to 66, inclusive. §§ 8470, 8471, 8472, 8473, 8474, 8475 and 8476.)

NOTE. Sec. 65 makes provision for a special method of collecting taxes assessed upon the capital stock of the bank.

4. Insurance companies. (Sec. 67; § 8477.)

NOTE A special method is provided for the collection of the taxes from insurance companies:

a. By requiring the forfeiture of $100 per day for each day the report is withheld or payment delayed, to be recovered in an action;

b. By authority conferred upon the Auditor of State to revoke the authority to do business.

5. As to express companies. (Sec. 68; § 8480.)

NOTE. Provision is made for a forfeiture of $100 per day:

a. For failure to report, and to be recovered in an action;

b. And prohibition from carrying on business until the payment is made.

6. A similar provision as to telegraph companies. (Sec 69; § 8478.)

7. A similar provision as to telephone companies. (Sec. 70; § 8479.)

8 A similar provision as to sleeping-car companies. (Sec. 71; § 7481.)

NOTE. In addition to other remedies, railroad companies are prohibited from hauling cars of the sleeping-car companies while in default.

9. Substantially a similar provision as to bridge and ferry companies. (Sec 72; § 8490.)

10. Street railroad, water works, gas, manufacturing and mining companies, etc., still a different provision. (Sec. 73; § 8491.)

NOTE. The provision in Sec. 73, for failure to make report. Secs. 73 to 75, inclusive.

11. Railroad companies. (Secs. 76 to 88, inclusive. §§ 8494, 8495, 8496, 8497, 8498, 8499, 8500, 8501, 8502, 8503, 8504 and 8506.

12. Building, loan fund and savings associations. (Sec. 89; § 8507.)

The question as to whether there is a difference between the properties of telegraph, telephone, sleeping-car and express companies having a unity of existence, ownership and operation in Indiana and in other states, and banks, mining, manufacturing and other local companies having a fixed locality and doing business from that locality, although in addition to that in other places, is too plain for argument. To a certain extent there is quite a close analogy between railroad companies and companies of the character named in the act of March 6, 1893, but even as to them there is a marked difference with respect to the possibility of the collection of taxes *in invitum* in the event it should be found necessary to collect the delinquent taxes by distraint from the railway company. There is in Indiana no power to levy or sell a portion of the roadbed or roadway of a railroad company.

Railway Co. v. *Boney*, 117 Ind. 501.

The same rule would apply to and prevent the levy upon and the collection of the taxes by the sale of the line of a telegraph or telephone company. If an attempt were made to levy upon sleeping-cars *in transitu* through or across the state while engaged in carrying on state or interstate commerce, the traveling public would be

very greatly discommoded if indeed such action should be permissible. In the case of railroad companies sufficient provision is made in the general statutes of the state by levy and sale of locomotives or cars subject to taxation not presently in use, for this might well be done without in anywise interfering in the discharge of the public duties cast upon a common carrier, leaving its duties to be performed by other cars and other locomotives. A portion of the line of a telegraph company could not clearly, under the Boney case, be levied upon and sold. If, however, the levy should be made upon the instruments or appliances engaged in the business of a common carrier of messages, the public duties of the telegraph company would be interfered with, and it would thereby be prevented from the discharge of its duties to the public and the general government, and this course could not be tolerated either directly or indirectly.

Western Union Telegraph Co. v. *Massachusetts*, 125 U. S., p. 554.

Nevertheless the taxes are to be collected, and to be collected *in invitum* if necessary. If, therefore, it is not proper that a state should levy and take into its possession, to the exclusion of the public, the line or the instruments with which telegraphing is carried on unless some provision is made whereby the collection of these taxes may be enforced through the processes of the courts, the State would be remediless in the premises and

powerless to collect its taxes except in the contingency that the company should see fit to voluntarily pay at its own sweet will, and the many appeals that have been taken and the delays that have been occasioned by this plaintiff in error in the various cases to which the attention of the court has been called show conclusively that if the state had no better way of collecting its taxes than by the voluntary payment by the company after it had been ascertained that the taxes were payable, it would be a long time before the State of Indiana would derive any revenue from this particular plaintiff in error.

The act in question applies equally to all persons, whether natural or artificial, and all properties of the same general character which are in the same condition.

Hymes v. *Aydelott*, 26 Ind. 434.
Boyer v. *Jones*, 14 Ind. 357.
Palmer v. *Stumph*, 29 Ind. 329.
Consumers Gas Co. v. *Harless et al.*, 131 Ind. 452.
State v. *Consolidated, etc., Co.*, 16 Nevada, 342.
McAurich v. *Mississippi, etc., Co.*, 20 Ia. 338.
Am. and Eng. Ency. of Law, vol. 25, pp. 302–304.

By Section 56 of the act of 1891, §8466 of the Revision of '94, the county auditor is required to add to the valuation made by the assessor fifty per cent., where the property holder has failed to

list or subscribe to oaths required, while by Section 75, §8493, R. S. 1894, in the case of manufacturing and mining, etc., companies, the auditor is required to add only twenty-five per cent.

The validity of Sec. 83 of the act of '52 in this respect substantially similar to Sec. 56 of the act of '91, was upheld by the Supreme Court in *Boyer* v. *Jones*, 14 Ind. 354. In *Hall* v. *DeOuir*, 95 U. S., it was said by Mr. Justice Clifford at p. 503: "Substantial equality is the law of the state and of the United States, but equality does not mean identity." Each of the companies respecting which provision is made by the act of 1893 for the collection of its taxes represents a peculiar class of property engaged as a common carrier and owing duties to the public, state and interstate, and any act of interference with its properties by distraint and sale (the ordinary method of collecting taxes), necessarily means an interference with public business and the public convenience. A county treasurer might levy upon and take into his possession a horse or a domestic animal, and while it might interfere sadly with the comfort and convenience of the particular family interested, the public, as such, would have no concern with or interest in it. It is possible that the General Assembly of Indiana might have found some other process equally as efficacious as the one provided by this act, but that is not at all the question presented by this record. The question and the sole question is, is the process provided

an unconstitutional one? It would seem an extraordinary notion that the right to apply to a court for the enforcement of a public right in the discharge of a public duty should be said to be an unconstitutional process. *In re Debs, Petitioner*, 158 U. S. 564.

If resort to the courts for necessary relief is to be given, the right to a reimbursement for the expense occasioned thereby is a necessary incident thereto, and the extent and character of the reimbursement is purely a matter of legislative discretion. Doubless the legislature might have provided that this penalty, instead of being 50 per cent., should be only 25, or 10, or even 5, but which of these sums should be fixed upon is necessarily a matter of which the legislature should be the judge, and its conclusion upon that should be final. Where the legislature has a right to exercise a legislative discretion, it would seem to be an extraordinary process of law that the courts would attempt to revise this discretion. If it should seem to the recusant taxpayer that the burden provided by the particular act whose validity he desires to question is too great to be borne, in this State of Indiana he has a simple and direct method of avoiding the burden by complying with the requirements of the particular statutes and paying his taxes under protest. If he supposes that the statute as a whole, or in any essential part, is unconstitutional, and, therefore, not binding on him, and he desires to test that question, a safe and proper method is afforded

him by paying his taxes under protest and suing to recover the illegal exaction. Ample provision is made by the first and second sections of the act of July 24, 1853, sections 7915 and 7916 of the Revision of 1894, under the first of which the board doing county business is required to refund from the county treasury the portion of the illegal exaction paid on account of the taxes of the county, and under the second of which the same board is required to ascertain the amount with respect to the state's portion of the taxes, and upon certificate of its action the auditor of state is required to audit the same as a claim against the treasury, and the treasurer of state is required to pay the same out of moneys not otherwise appropriated. It rests entirely with the tax-payer whether this penalty shall be exacted or not. It can not be exacted unless he is sued, and whether he shall be sued or not depends upon his conclusion whether or not he will pay as required by law.

The plaintiff in error in this case elected to choose its remedy, and in so doing has put the authorities of the state to delay, at this time covering nearly three years, and this record and the decisions in the various cases heretofore alluded to are witnesses—not mute—to the annoying vexations, expenses and troubles which it has placed upon the defendant in error and compelled its officers to submit to, and we respectfully submit that having elected to vex the authorities of the state by litigation piled upon litigation, it stands

now in no condition to ask for relief from the consequences that have followed as the result of its own deliberate acts.

The equal protection of the law was afforded it and no local or special law was passed regarding it or its property, for all property of the same character and under the same circumstances is placed by the act of 1893 under the same burden, no greater and no less.

Due process of law—the law of the land—was afforded it before any steps were taken to affect its property by suit or penalty. It challenged that law to a test of strength, and having learned in the hard lesson of experience that the law of the land was more powerful even than the Western Union Telegraph Company, it should now bow to it and no longer be heard on its false clamor.

We submit that no good cause has been shown why this writ of error should have been prosecuted. If in the exercise of a curiosity, whether laudable or not, we do not care to discuss, the plaintiff in error believing that its rights were infringed upon by the legislation in question saw fit to apply to the court for relief, that was its right; but when it exercised this right it, like all other citizens, exercised those rights subject to the burdens and all the burdens that the law thereby imposed upon it.

Abundant resting places have been afforded to it to reconsider its determination and retrace its steps. After the decision of the Backus cases in the Supreme Court of Indiana and before the

passage of the law, notice was served upon it that legislation of this character was proper. When the Backus cases were affirmed, in 154 U. S., substantially the contentions against the validity of the law were put at rest. When the Supreme Court of Indiana affirmed the Taggart case there was a time for sober and serious reflection. When that case was affirmed in this court the litigation should have ceased and the taxes should have been paid, but still, notwithstanding the repeated adjudications against it, and its insistent claim, it is again before this court asking to be relieved from the penalties that only accrued because of its continued contumacy, and with poor grace, we insist, it asks further consideration and consequent relief from this high court. There ought, it seems to me, at some time, to be an end to litigation. We believe that time was reached long since in the progress of this litigation, but if not we insist that now is the time when it should terminate, and we, therefore, earnestly urge that the judgment of the court may be affirmed.

Respectfully submitted,

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APPENDIX.

AN ACT supplementary to and amendatory of an act entitled "An act concerning taxation, repealing all laws in conflict therewith, and declaring an emergency," approved March 6, 1891, and providing for the taxation of telegraph, telephone, palace car, sleeping car, drawing-room car, dining car, express and fast freight, joint stock associations, companies, copartnerships and corporations transacting business in the State of Indiana, repealing sections 68, 69, 70 and 71 of said act and all laws in conflict therewith, and declaring an emergency.

[APPROVED MARCH 6, 1893.]

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That any joint stock association, company, copartnership or corporation, whether incorporated under the laws of this State or of any other State, or of any foreign nation, engaged in transmitting to, from, through, in or across the State of Indiana, telegraphic messages, shall be deemed and held to be a telegraph company, and every such telegraph company shall, annually, between the first day of April and the first day of June, make out and deliver to the Auditor of State a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the first day of April next preceding, showing:

First. The total capital stock of such association, company, copartnership or corporation.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the State, and the location and assessed value thereof, in each county or township where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership or corporation, situate outside theof Indiana, State

and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used and the sum at which the same is assessed for taxation in the locality where situated.

Seventh All mortgages upon the whole or any of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines of said association or company.

(*b*) The total length of so much of their lines as is outside the State of Indiana.

(*c*) The length of the lines within each of the counties and townships within the State of Indiana.

SEC. 2. Every telephone company doing business in this State, whether incorporated under the laws of this State, or of any other State, or of any foreign nation, shall annually, between the first day of April and the first day of June, make out and deliver to the Auditor of State a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the first day of April next preceding, showing:

First. The total capital stock of such association, company, copartnership or corporation.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures and appliances owned by said asssociation, company, copartnership or corporation, and subject to local taxation within the State, and the location and assessed value thereof in each county or township where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership or corporation, situate outside the State of Indiana and not used directly in the conduct of the business, with a specific description of each piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines of said association or company.

(*b*) The total length of so much of their lines as is outside the State of Indiana.

(*c*) The length of the lines within each of the counties and townships within the State of Indiana.

SEC. 3. Every joint stock association, company, copartnership or corporation incorporated or acting under the laws of this or any other State, or any foreign nation engaged in conveying to, from, through, in or across this State, or any part thereof, money, packages, gold, silver, plate, merchandise, freight or other articles, under any contract, express or implied, with any railroad company, or the managers, lessees, agents or receivers thereof, provided such joint stock association, company, copartnership or corporation is not a railroad company, shall be deemed and held to be an express company within the meaning of this act, and every such express company shall annually, between the first day of April and the first day of June, make out and deliver to the Auditor of State a statement, verified by the oath of the officer or agent of such association, company, copartnership or corporation making such statement with reference to the first day of April next preceding, showing:

First. The total capital stock or capital of said association, company, copartnership or corporation.

Second. The number of shares of capital stock issued and outstanding and the par or face value of each share, and, in case no shares of capital stock are issued, in what manner the capital thereof is divided and in what manner such holdings are evidenced.

Third. Its principal place of business.

Fourth. The market value of the said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof; and in case no shares of stock have been issued, state the market value, or the actual value in case there is no market value, of the capital thereof, and the manner in which the same is divided.

Fifth. The real estate, structures, machinery, fixtures and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the State of Indiana, and the location and assessed value thereof in each county or township where the same is assessed for local taxation.

Sixth. The specific real estate, together with the improvements thereon, owned by said association, company, copartnership or corporation, situate outside the State of Indiana and not used directly in the conduct of the business, with a specific description of each piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines or routes over which such association, company, copartnership or corporation transports such merchandise, freight or express matter.

(*b*) The total length of such lines or routes as are outside the State of Indiana.

(*c*) The length of such lines or routes within each of the counties and townships within the State of Indiana.

SEC. 4. Every joint stock association, company, copartnership or corporation incorporated or acting under the laws of this or any other State, or of any foreign nation, and conveying to, from, through, in or across this State, or any part thereof, passengers or travelers in palace cars, drawing-room cars, sleeping cars, dining cars or chair cars, under any contract, express or implied, with any railroad company, or the managers, lessees, agents or receivers thereof, shall be deemed and held to be a sleeping-car company for the purposes of this act; and every such sleeping-car company doing business in this State shall, annually, between the first day of April and the first day of June, make out and deliver to the Auditor of State a statement, verified by the oath of the officers or agent of such company making such statement, with reference to the first day of April next preceding, showing:

First. The total capital stock of such association, company, copartnership or corporation.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the State, and the location and assessed value thereof in each county or township where the same is assessed for local taxation.

Sixth. The specified real estate, together with the permanent improvements thereon, owned by such association, company, copartnership or corporation, situate outside the State of Indiana, and not used directly in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any of its property, together with the franchises and amounts thereof.

Eighth. (a) The total length of the main lines of all the railroad companies over which said cars are run.

(*b*) The total length of so much of the main lines of the railroad companies over which said cars are run as is outside the State of Indiana.

(*c*) The length of the lines of said railroad companies over which said cars are run within each of the counties and townships within the State of Indiana: *Provided*, That where the railroads, over which said lines run, have double tracks, or a greater number of tracks than a single track, the statement shall only give the mileage as though such tracks were but a single track, and in case the Auditor of State shall require it, such statement shall show in detail the number of miles of each or any particular railroad system or division.

SEC. 5. Upon the filing of such statements the Auditor of State shall examine them, and each of them, and if he shall deem the same insufficient, or in case he shall deem that other information is requisite, he shall require such officer to make

such other and further statements as said Auditor of State may call for. In case of the failure or refusal of any association, company, copartnership or corporation to make out and deliver to the Auditor of State any statement or statements required by this act, such association, company, copartnership or corporation shall forfeit and pay to the State of Indiana one hundred ($100) dollars for each additional day such report is delayed beyond the first day of June, to be sued and recovered in any proper form of action in the name of the State of Indiana on the relation of the Auditor of State, and such penalty, when collected, shall be paid into the general fund of the State.

SEC. 6 Upon the meeting of the State Board of Tax Commissioners for the purpose of assessing railroad and other property, said Auditor of State shall lay such statements, with such information as may have been furnished him, before said Board of Tax Commissioners, who shall thereupon value and assess the property of each association, company, copartnership or corporation in the manner hereinafter set forth, after examining such statements and after ascertaining the value of such properties therefrom, and from such other information as they may have or obtain. For that purpose they may require the agents or officers of said association, company, copartnership or corporation to appear before them with such books, papers or statements as they may require, or they may require additional statements to be made to them, and may compel the attendance of witnesses, in case they shall deem it necessary, to enable them to ascertain the true cash value of such property.

SEC. 7. Said State Board of Tax Commissioners shall first ascertain the true cash value of the entire property owned by said association, company, copartnership or corporation from said statements or otherwise, for that purpose, taking the aggregate value of all the shares of capital stock, in case said shares have a market value, and in case they have none, taking the ac ual value thereof or of the capital of said association, company, copartnership or corporation, in whatever manner the same is divided, in case no shares of capital stock have been issued: *Provided, however,* That in case the whole, or any portion of the property of such association, company, copartnership or corpo-

ration shall be incumbered by a mortgage or mortgages, such Board shall ascertain the true cash value of such property by adding to the market value of the aggregate shares of stock or to the value of the capital, in case there shall be no such shares, the aggregate amounts of such mortgage or mortgages, and the result shall be deemed and treated as the true cash value of the property of such association, company, copartnership or corporation. Such Board of Tax Commissioners shall, for the purpose of ascertaining the true cash value of the property within the State of Indiana, next ascertain from such statements or otherwise, the assessed value for taxation, in the localities where the same is situated, of the several pieces of real estate situate without the State of Indiana and not specifically used in the general business of such associations, companies, copartnerships or corporations, which said assessed values for taxation shall be by said Board deducted from the gross value of the property as above ascertained. Said State Board of Tax Commissioners shall next ascertain and assess the true cash value of the property of such associations, companies, copartnerships or corporations within the State of Indiana, by taking the proportion of the whole aggregate value of said associations, companies, copartnerships or corporations, as above ascertained, after deducting the assessed value of such real estate without the State, which the lengths of the lines of said associations, companies, copartnerships or corporations, in the case of telegraph and telephone companies within the State of Indiana, bears to the total length of the lines thereof; and in the case of palace, drawing-room, sleeping, dining or chair car companies, the proportion shall be the proportion of such aggregate value, after such deductions, which the length of the lines within the State, over which said cars are run, bears to the length of the whole lines over which said cars are run; and in the case of express companies, the proportion shall be the proportion of the whole aggregate value, after such deductions, which the length of the lines or routes, within the State of Indiana, bears to the whole length of the lines or routes of such associations, companies, copartnerships or corporations, and such amount, so ascertained, shall be deemed and held as the entire value of the property of said associations, companies, copartner-

ships or corporations within the State of Indiana. From the entire value of the property within the State so ascertained, there shall be deducted, by said Board, the assessed value for taxation of all the real estate, structures, machinery and appliances within the State and subject to local taxation in the counties and townships, as hereinbefore described in Item No. 5 of sections 1, 2, 3 and 4 of this act, and the residue of such value so ascertained, after deducting therefrom the assessed value of such local properties, shall be by said Board assessed to said association.

SEC. 8. Said State Board of Tax Commissioners shall thereupon ascertain the value per mile of the property within the State by dividing the total value, as above ascertained, after deducting the specific properties locally assessed within the State by the number of miles within the State, and the result shall be deemed and held as the value per mile of the property of such association, company, copartnership or corporation within the State of Indiana.

SEC. 9. Said State Board of Tax Commissioners shall thereupon for the purpose of determining what amount shall be assessed by it to said association, company, copartnership or corporation in each county in the State, through, across, into or over which the line of said association, company, copartnership or corporation extends, multiply the value per mile as above ascertained by the number of miles in each of such counties as reported in said statements, or as otherwise ascertained, and the result thereof shall be by said Board certified to the Auditor of State, who shall thereupon certify the same to the Auditors respectively of the several counties through, into, over or across which the lines or routes of said association, company, copartnership or corporation extend, and such Auditors shall apportion the amount certified for their counties respectively among the several townships into, through, over or across which such lines or routes extend in proportion to the length of the lines in such townships

SEC. 10. To enable said County Auditors to properly apportion the assessments between the several townships, they are authorized to require the agent of said association or company to

report to them respectively, under oath, the length of the lines in each township, and the Auditor shall thereupon add to the value so apportioned the assessed valuation of the real estate, structures, machinery, fixtures and appliances situated in any township, and extend the taxes thereon upon the duplicates as in other cases.

SEC. 11. In case any such association, copartnership or corporation as named in this supplemental and amendatory act shall fail or refuse to pay any taxes assessed against it in any county or township in the State, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the State of Indiana by the Prosecuting Attorneys of the different judicial circuits of the State, on the relation of the Auditors of the different counties of this State, and the judgment in said action shall include a penalty of fifty per cent of the amount of taxes so assessed and unpaid, together with reasonable attorney's fees for the prosecution of such action, which action may be prosecuted in any county into, through, over or across which the line or route of any such association, copartnership, company or corporation shall extend, or in any county where such association, company, copartnership or corporation shall have an office or agent for the transaction of business. In case such association, company, copartnership or corporation shall have refused to pay the whole of the taxes assessed against the same by said State Board of Tax Commissioners, or in case such association, company, copartnership or corporation shall have refused to pay the taxes or any portion thereof assessed to it in any particular county or counties, township or townships, such action may include the whole or any portion of the taxes so unpaid in any county or counties, township or townships, but the Attorney-General may, at his option, unite in one action the entire amount of the tax due, or may bring separate actions in each separate county or township, or join counties and townships, as he may prefer. All collection of taxes for or on account of any particular county made in any such suit or suits, shall be by said Auditor of State accounted for as a credit to the respective counties for or on account of which such collections were made by said Auditor of State, at

the next ensuing settlement with such county, but the penalty so collected shall be credited to the General Fund of the State; and upon such settlement being made, the Treasurers of the several counties shall, at their next settlements, enter credits upon the proper duplicates in their offices, and at the next settlement with such county report the amount so received by him in his settlement with the State, and proper entries shall be made with reference thereto: *Provided, however*, That in any such action the amount of the assessment fixed by said State Board of Tax Commissioners and apportioned to such county, or apportioned by the County Auditor to any particular township, shall not be controverted.

SEC. 12. Inasmuch as the provisions of this act are intended to take the place of sections 68, 69, 70 and 71 of the act entitled "An act concerning taxation, repealing all laws in conflict therewith and declaring an emergency," approved March 6, 1891, such sections and each of them and all other laws and parts of laws in conflict with this act are hereby repealed: *Provided*, That all moneys now due the State, or which may become due on the 1st day of April, 1893, or at any other time, on account of any assessment or charge made against any of the joint stock associations, persons, companies or corporations on account of per cent. on gross or net earnings for the preceding year or years, and all penalties and charges thereon growing out of any failure to make reports on payments as now required by the provisions of the aforesaid repealed sections shall be paid and collected under the provisions of said repealed sections the same as if said sections were not repealed, and any suit brought for the recovery of such money, taxes or penalties shall be begun under the provisions of said repealed sections and prosecuted to final judgment thereunder in all respects the same as if said sections were continued in full force; and it is hereby expressly provided that all the rights of the State accrued, or which may accrue on the 1st day of April, 1893, on account of receipts for the preceding years, are hereby saved from the operation of the aforesaid repealing clause.

SEC. 13. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in force from and after its passage.